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No. 94-796

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

DR. JOHN HAGELIN FOR PRESIDENT COMMITTEE OF KANSAS, DR. JOHN HAGELIN, JESSIE NICHOLS, PATRICIA ROBINSON, WANDA FERN KELLY,

Petitioners,

v.

BILL GRAVES, *in his official capacity as Secretary of State of Kansas,*

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W CAMPBELL
Deputy Attorney General
Kansas Judicial Center, Second Floor
Topeka, Kansas 66612
(913) 296-2215
Counsel of Record for Respondent

January 4, 1995

QUESTIONS PRESENTED

I. The Tenth Circuit decision is not in conflict with current Supreme Court decisions.

II. The filing deadline for independent nomination petitions used by the State of Kansas did not impose an unconstitutional burden on the Petitioners.

III. The Kansas filing deadline is reasonable and nondiscriminatory and, when combined with the state's important regulatory interests, justified.

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STATEMENT OF THE CASE

This case involves the balancing of the right of citizens to vote and the state's power to regulate elections. Petitioners, who are members of the Natural Law Party, missed the deadline set forth in K.S.A. 25-305(b) for independent candidates to file nomination petitions. K.S.A.

25-305(b) required nomination petitions for independent candidates to be filed ninety-one days prior to the general election in 1992.

The United States District Court of Kansas, by Memorandum Decision dated August 31, 1993, granted defendant/respondent Bill Graves, the Secretary of State of Kansas, summary judgment in this 42 U.S.C. § 1983 action. The Tenth Circuit Court of Appeals affirmed the decision of the District Court in a published opinion.

The facts are undisputed. The Natural Law Party (Party) was formed April 20, 1992, too late to file for recognized party status under K.S.A. 25-302(a) that year. In late June 1992, the Party began efforts to obtain the necessary nominating petitions. On August 3, 1992, the K.S.A. 25-305(b) filing deadline for independent candidates, the Party's candidates submitted petitions containing less than the 5000 signatures required for filing. The Secretary of State rejected the petitions for insufficient signatures. On August 14, 1992, eleven days past the filing deadline, the Party filed additional nomination petitions. The Secretary of State rejected these untimely petitions.

Kansas does not impose a specific deadline for the filing of Republican and Democratic nominations for President. K.S.A. 25-301. In 1992, the Republican party nominated its' candidate on August 19th. The Party had submitted their untimely petitions with sufficient numbers on August 14, 1992 and were rejected. Therefore, in 1992, independent candidates were required to file nominating petitions before the Republican presidential nominee was known.

The Party contends that Kansas' ballot access laws unfairly discriminate against independent candidates by imposing a filing deadline for independent candidates ninety-one days before the general election, while the Republican and Democratic parties can place their presidential candidates on the ballot after such candidates are designated. The Party argues that the filing requirements violate their First and Fourteenth Amendment speech, voting and associational rights.

Respondent contends that the burden imposed upon the Party's 1st and 14th Amendments rights by K.S.A. 25-305(b) is slight and that the state's interests, including voter education, are sufficient to justify the nomination petition filing deadline.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE TENTH CIRCUIT DECISION IS NOT IN CONFLICT WITH CURRENT SUPREME COURT DECISIONS.

The Party contends that the Tenth Circuit Court of Appeals decided the federal question of ballot access in this case by applying a standard seemingly in conflict with the decision of the Eighth Circuit Court of Appeals. The Tenth Circuit applied the reasoning used in *Anderson v. Celebrezze*, 460 U.S. 780, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983). The standard set forth in *Anderson* is a balancing test wherein:

> A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the right protected by the

> First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'

Burdick v. Takushi, 504 U.S. _____, 119 L. Ed. 2d 245, 112 S. Ct. 2059, 2063 (1992) (quoting *Anderson*); *See Rainbow Coalition v. Oklahoma State Election Bd.*, 844 F.2d 740, 743 (10th Cir. 1988); *See Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-14, 93 L. Ed. 2d 514, 107 S. Ct. 544 (1986).

The Eighth Circuit applied strict scrutiny for purposes of equal protection challenges to ballot access restrictions. *Manifold v. Blunt*, 863 F.2d 1368, 1372 (1988), *cert denied*, 493 U.S. 893, 107 L. Ed. 2d 192, 110 S. Ct. 242 (1989). This standard requires that the restrictions must be necessary to serve a compelling state interest, and may not go beyond what the state's interest actually requires.

The Party would have the Court decide the proper standard to be applied to an equal protection challenge. The Court has held that when addressing a First Amendment challenge to a state election law, the balancing test in *Anderson* applies.

The Court has decided the proper standard that applies to ballot access restrictions. In *Burdick*, 112 S.Ct. at 2063, the Court held that strict scrutiny is not appropriate in every voting regulation case.

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, 'whether it governs the registration and qualifi-

> cations of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree— the individual's right to vote and his right to associate with others for political ends.' *Anderson* at 1569-1570. Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State's system 'creates barriers. . . tending to limit the field of candidates from which voters might choose. . . does not of itself compel close scrutiny.'

Bullock v. Carter, 405 U.S. 134, 143, 31 L. Ed. 2d 92, 92 S. Ct. 849 (1972); *Anderson*, 103 S. Ct. at 1569-1570; *McDonald v. Board of Election Comm'nrs of Chicago*, 394 U.S. 802, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969).

The full Court in *Anderson* agreed that a standard which is more flexible than a strict scrutiny standard applies to ballot access cases. This standard is the balancing approach that has been used in the two most recent ballot access cases this Court has decided. *Burdick v Takushi*, 112 S. Ct. 2059 (1992), and *Norman v. Reed*, 502 U.S. ——, 116 L. Ed. 2d 711, 112 S. Ct. 698 (1992). Both of these cases applied *Anderson*. Both of these cases were decided *after* the Eighth Circuit decided the case upon which Petitioners rely, *Manifold v. Blunt*, 863 F.2d 1368 (1988). The Tenth Circuit's use of the *Anderson* standard in deciding

the Party ballot access case is consistent with the most current ballot access cases decided by this Court.

II. THE FILING DEADLINE FOR INDEPENDENT NOMINATION PETITIONS USED BY THE STATE OF KANSAS DID NOT IMPOSE AN UNCONSTITUTIONAL BURDEN ON THE PETITIONERS.

The Party also contends that, even if the *Anderson* standard was appropriate, the Tenth Circuit decided this case contrary to *Anderson*. This is incorrect.

While recognizing that independent candidates would be best served by filing deadlines which fall after the major party conventions, the *Anderson* court did not hold that such a law was constitutionally mandated. Instead, it warned the States that they should not enact filing deadlines which fall unnecessarily far in advance of the primary and general election. Unlike *Anderson*, which involved a substantial advance deadline, this case involves a very innocuous filing deadline of 91 days prior to the general election.

The language in *Anderson* stops short of requiring states to enact filing deadlines which fall after the conventions of the major parties. In fact, the Court only goes so far as to state:

> If the states' filing deadline were later in the year, a newly emergent independent candidate could serve as the focal point for a group of Ohio voters who decide, after mid-March, that they are dissatisfied with the choices within the two major parties. As we recognized in *Williams v. Rhodes*, 393 U.S. at 33, 89 S.Ct. at 11, '{s}ince the principal

> policies of the major parties change to some extent from year to year and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected' group will rarely, if ever, be a cohesive or identifiable group until a few months before the election.

Anderson, 103 S. Ct. at 1571.

In *Blomquist v. Thomson*, 739 F.2d 525, 528 (10th Cir. 1984), the Tenth Circuit held that a June 1 deadline for a new political party seeking ballot access is a direct burden on voting rights because it "prevents a new party from seeking support at a time when such support is most likely to crystallize— after the established political parties have put forth their candidates and platforms." (citing *Anderson*, 460 U.S. at 790-91); *Rainbow Coalition*, 844 F.2d at 744 (May 31 deadline).

However, in *Rainbow Coalition*, 844 F.2d at 745-46, the Tenth Circuit did not give significant weight to undisputed evidence that minority parties have difficulty with petition drives until after the major parties' conventions, in light of the Supreme Court's approval of filing deadlines before the major party conventions in previous cases. *American Party v. White*, 415 U.S. 767, 787 n.18, 39 L. Ed. 2d 744, 94 S. Ct. 1296 (1974) and *Jenness v. Fortson*, 403 U.S. 431, 438, 29 L. Ed. 2d 554, 91 S. Ct. 1970 (1971).

Using *Anderson* as a guide, the Tenth Circuit concluded that the filing deadline for independent candidates in this case which fell a few weeks before one major party's convention one year did not impose a substantial burden on voting rights. The deadlines in previous Tenth Circuit cases

and *Anderson* fell before the major parties held their conventions as well. Consequently, the present case was decided in line with *Anderson*.

The Tenth Circuit also concluded that the open-ended deadline for the major parties in this case does not discriminate against the independent candidate. The Tenth Circuit reasoned that because K.S.A. 25-4502(b) requires that major party nominees must file a declaration of intent or qualifying petition by February 12 to run in the presidential preference primary, and then survive the primary and national convention, major party nominees also have hurdles to cross just as the independent nominees have.

While independent nominees face different burdens, they are not more onerous than the burdens major party candidates face. Arguably, independent candidates face a lighter burden because a nonparty candidate need only obtain the necessary number of signatures and file a petition in early August for his or her name to appear on the ballot. Independent candidates do not have to win a primary race or face the same public scrutiny that major party candidates face in order to be placed on the ballot.

The Kansas filing deadline did not impose an unconstitutional burden on independent candidates.

III. THE KANSAS FILING DEADLINE IS REASONABLE AND NONDISCRIMINATORY AND, WHEN COMBINED WITH THE STATE'S IMPORTANT REGULATORY INTERESTS, JUSTIFIED.

The Tenth Circuit after viewing Kansas' election scheme in its entirety, concluded that the independent filing

deadline is a reasonable response to the state's interest in voter education. See *Libertarian Party v. Bond*, 764 F.2d 538, 541 (8th Cir. 1985). Presidential candidates who run in the presidential preference primary must file their nominating papers almost six months in advance of independent candidates. Independent candidates have until August to file. The six month excess time period for major party candidates serves to educate the public as to their viability as the party's candidate.

It is reasonable for Kansas to require, in the interest of voter education, that independents make their candidacies official around the same time the major party candidates are made known to the public. After the primary and the independents file, the candidates can then begin debating the issues and subject themselves to public scrutiny. Because the exact dates of the major party conventions are not known from year to year, but the approximate time frame is (the summer months), it is reasonable for Kansas to choose a filing date for independent candidates that is around the time all of the candidates will be known. See *Anderson*, 460 U.S. at 800.

The Kansas filing deadline is reasonable and nondiscriminatory. The state's interest in voter education justifies the slight burden K.S.A. 25-305(b) imposes on plaintiff's rights.

CONCLUSION

The Respondent respectfully submits that the Writ of Certiorari prayed for in this action be denied for the following reasons: (1) The Tenth Circuit decision is not in conflict with current Supreme Court decisions; (2) The filing

deadline for independent nomination petitions used by the State of Kansas did not impose an unconstitutional burden on the Petitioners; (3) The Kansas filing deadline is reasonable and nondiscriminatory and, when combined with the state's important regulatory interests, justified.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas

JOHN W. CAMPBELL
Deputy Attorney General
Kansas Judicial Center
Second Floor
Topeka, Kansas 66612-1597
(913) 296-2215
Counsel of Record for Respondent